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RECORD, CASE No. 14,760.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 81 765

THE FORT WORTH CITY COMPANY, PLAINTIFF IN ERROR,

vs.

THE SMITH BRIDGE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED JULY 22, 1891.

RECORD, CASE No. 14,760.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 851.

THE FORT WORTH CITY COMPANY, PLAINTIFF IN ERROR,

vs.

THE SMITH BRIDGE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 12, 1893.

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1 *Caption and Style of Cause.*

Be it remembered that at a term of the circuit court of the United States within and for the fifth judicial circuit and northern district of Texas, at Dallas, which term convened on May 18th, A. D. 1891, and adjourned the 10th day of July, A. D. 1891—present and presiding, the Hon. A. P. McCormick, United States district judge—the following cause, among others, came on for trial, to wit:

THE SMITH BRIDGE COMPANY
vs.
THE FORT WORTH CITY COMPANY. } No. 1339.

Plaintiff's Original Petition. Filed Dec. 8, 1890.

STATE OF TEXAS, }
United States of America. }

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, January Term, 1891.

To the hon. the judges of the circuit court of the United States for the northern district of Texas, at Dallas:

The Smith Bridge Company, complaining of the Fort Worth City Company, shows that plaintiff is a private corporation duly incorporated under and by virtue of the laws of the State of Ohio, and has its domicil in the city of Toledo, said State of Ohio, and that the defendant is a private corporation duly incorporated under and by virtue of the laws of the State of Texas, and has its domicil in the city of Fort Worth, Tarrant county, Texas.

2 That Wallace Hendricks is president of said defendant Co. and A. T. Byers is secretary of said defendant Co., and that both — said last-named persons reside in Tarrant county, Texas.

That heretofore, on, to wit, the 19th day of May, 1888, the plaintiff and the defendant did make and enter into a certain contract of that date with each other on said day, duly executed in duplicate by said parties and duly delivered, a copy of which contract is hereto attached, marked "Exhibit A," and made a part hereof, whereby said Smith Bridge Company, for the consideration in said contract mentioned, agreed and bound itself to build and con-truct a certain iron highway bridge across the Trinity river, in the city of Fort Worth, Texas, at a point north of the public square in said city of Fort Worth to be selected and designated by the city engineer of said city, the superstructure, roadway, proportions, sidewalks, and all materials, works, and furnishings of every kind and of every part of said bridge to be built and constructed in exact accordance with the specifications furnished and signed by W. B. King, the then engineer of said city of Fort Worth, which said specifications were further designated as being attached, together

with diagram and specifications of the Smith Bridge Co., to a contract of said Smith Bridge Co. with the city of Fort Worth.

And said defendant by said contract agreed, contracted, and bound itself that in consideration of the building and construction of the above-described bridge in accordance with the above-mentioned specifications, to the acceptance of the city engineer and the street and alley committee of the city of Fort Worth, Texas, and the turning of the said bridge over to the said city of Fort Worth, completed in accordance with said contract, that it, said defendant, would pay to said plaintiff the sum of eight thousand one hundred and sixty-six and $\frac{66}{100}$ dollars, said amount to be paid in cer-
3 tain mortgage bonds mentioned in said contract at their par value. The said contract further provided that whereas the city of Fort Worth and the county of Tarrant, Texas, are to agree or have agreed with the said Smith Bridge Co. to pay one-third each of the cost of the above-described bridge, the entire cost of said bridge to be of $24,500.00, if the said city of Fort Worth & Tarrant county shall fail to enter into and sign agreements with the said bridge Co. arranging for the payment of their respective portions of said total consideration to the satisfaction of the said bridge Co. said contract should now be binding on the parties thereto.

And plaintiff avers that said city of Fort Worth and said county of Tarrant did, without delay and to the satisfaction of said plaintiff, sign contracts with it arranging for the payment of their respective portion of the cost of said bridge as mentioned in the contract hereto attached, and that said city and county have since and upon the completion of said bridge, as hereinafter set out, fully paid off and discharged their respective obligations by them assumed in said contracts.

Plaintiff avers that, in pursuance to its contract with defendant as herein aforesaid, it proceeded to build and construct said bridge mentioned in said contract in strict and exact accordance with said contract, and did, on, to wit, the 16th day of March, 1889, fully finish and complete said bridge to the full satisfaction and acceptance of the city engineer and the street and alley committee of the said city of Fort Worth, and did, on, to wit, the 19th day of March, 1889, turn over said bridge to said city of Fort Worth, completed in accordance with said contract with defendant and the contracts with the city of Fort Worth and the county of Tarrant; wherefore said city of Fort Worth did, on, to wit, the 19th day of March, 1889,
accept said bridge, and thereupon said city of Fort Worth
4 and said county of Tarrant did each settle with plaintiff for the one-third part of the cost price of said bridge in accordance with their respective contracts.

That thereafter, on, to wit, 20th day of March, 1889, and on divers days after that time and before the institution of this suit, plaintiff demanded of the defendant that it deliver to plaintiff the bonds by it contracted to be delivered to plaintiff as herein aforesaid, amounting at par to the said sum of eight thousand one hundred and sixty-six and $\frac{66}{100}$ dollars, but the defendant did then, to wit, on said 20th

day of March, 1889, refuse and ever since has refused and still refuses to deliver to plaintiff said mortgage bonds or any part thereof.

Plaintiff further avers that said bonds so contracted to be delivered by defendant to plaintiff were at the date when the same should have been delivered under said contract worth the full amount of the face value thereof, to wit, the said sum of $8,166.66:

Wherefore, the premises considered, plaintiff says that the defendant has become and is liable and bound to pay it the said sum of eight thousand one hundred and sixty-six and $\frac{66}{100}$ dollars, with interest thereon at the rate of eight per cent. per annum from the 20th day of March;

Yet to pay the same or any part thereof the defendant, though often requested, has failed and refused and still fails and refuses, to plaintiff's damage ten thousand dollars.

Wherefore plaintiff sues and prays that the defendant be cited to appear and answer this petition, and that plaintiff have judgment for its debt, damages, interest, and cost of suit, and all further relief, general and special, to which, the premises considered, it may be entitled.

GREENE & HUMPHREYS,
Solicitors for Plaintiff.

5 "EXHIBIT A."

STATE OF TEXAS. }
County of Tarrant. }

This memorandum of an agreement between the Fort Worth City Company of Fort Worth, Texas, and the Smith Bridge Company of Toledo, Ohio, witnesseth:

That the said Smith Bridge Company for the consideration hereinafter mentioned, does covenant and promise and by the covenants of this contract hereinafter mentioned, binds itself, its successors and assigns, to build and construct a certain iron highway bridge, across the Trinity river, in the city of Fort Worth, Texas, at a point north of the public square in said city of Fort Worth, to be selected and designated by the city engineer of said city; the superstructure, roadway, proportion, sidewalks and all materials, works and furnishings of every kind and of every part of said bridge are to be built and constructed in exact accordance with the specifications furnished and signed by W. B. King, engineer of said city of Fort Worth, said specifications being and the same are hereby made a part hereof, and together with a diagram and specifications of the said Smith Bridge Company are attached to a contract of said bridge company with the city of Fort Worth, Texas, and marked "Exhibits A, B & C."

In consideration of the premises, that is, the building and construction of the above-described bridge, in accordance with the above-mentioned specifications to the acceptance of the city engineer and the street and alley committee of the city of Fort Worth, Texas, and the turning of said bridge over to the said city of Fort Worth,

completed, in accordance with this contract and in accordance with the contracts with the city of Fort Worth and the county of
6 Tarrant, State of Texas, the said Fort Worth City Company shall pay to the said Smith Bridge Company the sum of eight thousand one hundred and sixty-six and sixty-six one-*thousandths* ($8,166.66) dollars, said amount to be paid by the said Fort Worth City Company in first-mortgage bonds at their par value bearing eight per cent. per annum interest and being a part of those certain first-mortgage bonds executed by the Fort Worth City Company and the North Side Railway Company and secured by deed of trust upon the lands and possessions and franchises of the said Fort Worth City Company and the North Side Railway Company, lying in and about the northern limits of the city of Fort Worth, Texas, said deed of trust having been executed on the first day of January, 1888, by the said Fort Worth City Company and the North Side Railway Company to the American Loan & Trust Company of Boston, Massachusetts, and being of record in Book H, page 197, of Records of Deeds of Trust for Tarrant County Texas, said bonds to be delivered to the said Smith Bridge Company when said bridge is completed and accepted as above provided, and it is further agreed herein that whereas, the city of Fort Worth and the county of Tarrant, Texas, are to agree or have agreed with the said bridge company to pay one-third each of the cost of the above-designated bridge, the entire structure to cost twenty-four thousand and five hundred dollars, that if the above-named city of Fort Worth and the county of Tarrant, Texas, shall fail to enter into and sign agreements with the said bridge company arranging for the payment of their respective portions of said total consideration, to the satisfaction of the said bridge company, this agreement shall not be binding on the parties hereto.

It is further agreed and understood that the said Fort Worth City Company, shall in no event be liable for the payment of more than one-third of the total consideration as above stipulated.

7 Witness the hands of the parties hereto on this, the 19th day of May, 1888.

Executed in duplicate.

[Seal of Fort Worth City Co.]

FORT WORTH CITY COMPANY.
W. A. HUFFMAN, *Prest.*
A. T. BYERS, *Sec.*
SMITH BRIDGE CO.,
By C. J. McMANIS.

8 *Defendant's First Amended Original Answer. Filed June* 17, 1891.

SMITH BRIDGE COMPANY
vs.
FORT WORTH CITY COMPANY.

Suit pending in the United States circuit court for the northern district of Texas, at Dallas.

Now comes the defendant in the above-entitled cause by leave of the court and files this its first amended original answer in lieu of its former pleadings herein; and thereupon said defendant demurs to plaintiff's petition and says that the same shows no cause of action against it, and of this it prays the judgment of the court.

TEMPLETON & CARTER,
Defendant's Attorneys.

And for special exception the defendant says that it excepts, for that the plaintiff's petition herein fails to disclose the purpose or purposes for which the plaintiff corporation was created, and for the reason that the said petition does not disclose the purpose or purposes for which the defendant corporation was created and organized.

TEMPLETON & CARTER,
Defendant's Attorneys.

For further special exception to said petition defendant says that it shows by its averments that the contract herein sued upon was made and entered into for the benefit of the county of Tarrant and
9 for the city of Fort Worth, both municipal corporations of the State of Texas, without disclosing any power or authority in the defendant to so use its funds, assets, bonds, and property, and without disclosing why the defendant is bound by such pretended contract.

TEMPLETON & CARTER,
Defendant's Attorneys.

And the defendant denies all and singular the averments contained in the said petition.

TEMPLETON & CARTER,
Defendant's Attorneys.

And, for further answer herein, defendant says that it is a corporation organized under the provisions of title 20, Revised Statutes of the State of Texas, and the amendments thereto. The purpose for which it was created and organized was "for the purchase, subdivision, and sale of land in cities, towns, and villages," and for no other purpose or purposes.

A copy of defendant's articles of association or charter is hereto attached, marked "Exhibit A," and is made a part of this answer.

And the said defendant says that nothing contained in said articles of association or incorporation and nothing contained in the laws of the State of Texas authorized it to use its property, assets, bonds, and credits for the purpose of constructing a bridge for itself or for the city of Forth Worth or for the county Tarrant; that, so far from such use of its stock, funds, bonds, assets, property, and credit being authorized by the laws of the State of Texas, it is provided that no corporation created under the provision of said title 20 shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation.

10 Defendant avers that said bridge was contracted to be built for the use and benefit of the general public; that the same is a part of one of the public highways of the country, and is a part of a street under the control and owned by the city of Fort Worth; that the said bridge is not under this defendant's control, nor was it ever or ever to be under its control or owned by it, and the same is in nowise used, nor can it be, for its benefit, except as the same may be used by the general public; that the contract sued on to so use any part of its property was illegal, unauthorized, *ultra vires* the corporation, and was and is void.

And defendant further says that the said contract was unauthorized by its charter, and therefore *ultra vires* and void, for that it provided that this defendant should deliver to plaintiff bonds executed by itself and by the North Side Railway Company, a wholly separate and independent corporation; that this defendant was not authorized to and could not execute a bond jointly with any corporation, and that this defendant was not authorized to obligate itself to deliver any bonds or obligations executed and issued by any other corporation; that it was not authorized to and could not legally acquire the bonds, obligations, and securities of any other corporation or person; that the said bonds were to be secured by not only the property of this defendant, but also by the lands, possessions, and franchises of the said North Side Railway Company, which, as aforesaid, was to execute the said bonds jointly with this defendant.

And defendant further says that the sole and only benefit it ever expected to derive from the construction of said bridge was the enhancement of the value of its property by making it more convenient of access, and so more readily saleable; that the contract made by the plaintiff with the city of Fort Worth required the

11 completion of the bridge by the 1 day of Nov., 1888, and with reference to this stipulation the contract here sued on was entered into; that the value of the bridge to the defendant depended on its early completion; that instead of completing the said bridge according to the said contract by the said date it was not completed until at least six months after the time stated in the said contract with the city of Fort Worth; that had no time been stipulated for the completion of the said bridge so that it could be used by the public and its delivery to the city for that purpose the contract here sued on would not have been made; that the time of comple-

tion was an essential provision of the said contract, and the defendant has been greatly damaged by the failure of the plaintiff to complete the said bridge by the time stipulated in the contract with the city of Fort Worth, for that at the time the said contract was made there was an active demand for real estate in Fort Worth and in its suburbs that the def't expected would continue to the time and for a long — after the date when the bridge was to be completed; that had the bridge been completed it is believed and averred on belief that a considerable amount of its property could have been sold at a profit.

TEMPLETON & CARTER,
For the Def'ts.

EXHIBIT "A."

Be it known that the following-named persons, to wit, J. P. Smith, W. A. Huffman, and John D. Templeton, of the city of Fort Worth, in the county of Tarrant, in said State, and A. T. Byers and James Johnson, Jr., of the county of Clark and in the State of Ohio, have associated themselves together for the purpose of securing a charter for a private corporation under the provisions of title 20 of
12 the Revised Statutes of the State of Texas and the amendments thereto. The name of the corporation shall be the Fort Worth City Company.

The purpose for which the said corporation is formed is for the purchase, subdivision, and sale of land in cities, towns, and villages as provided and authorized by article 566 of the Revised Statutes as amended by chapter 61 of the Laws of 1885.

The place where the business of the said corporation is to be transacted is the city of Forth Worth, in the county of Tarrant.

The said corporation shall exist for the period of fifty years.

The number of the directors of the said corporation shall be five. The names and residences of those for the first year are as follows: J. P. Smith, W. A. Huffman, and Jno. D. Templeton, residing in the said city of Fort Worth, in the said county of Tarrant, and A. T. Byers and Jas. Johnson, Jr., who reside in the county of Clark, in the State of Ohio.

The capital stock of said corporation shall be five hundred thousand ($500,000.00) dollars, which shall be divided into five thousand shares of one hundred ($100.00) dollars each.

Witness our signatures on this the 16th day of April, A. D. 1887.

(Signed) J. P. SMITH.
W. A. HUFFMAN.
JOHN D. TEMPLETON.
A. Y. BYERS. [SEAL.]
JAS. JOHNSON, JR., [SEAL.]
Owner of One Share.

Executed in the presence of—
A. H. GILLETT.
JACOB M. MOSKLEY.

13 THE STATE OF OHIO, }
Clark County, } *ss:*

Be it remembered that on this the 16th day of April, 1887, before me, the undersigned, a notary public in and for said county, personally came A. T. Byers and James Johnson, Jr., two of the signers of above instrument, and acknowledged the signing and sealing of same to be their voluntary acts and deeds for the uses and purposes therein mentioned.

In testimony whereof I have hereto set my hand and official seal the day and year last named.

(Signed) ADAM H. GILLETT,
Notary Public for Clark County, Ohio.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, Thomas P. Martin, a notary public in and for Tarrant county, Texas, on this day personally appeared W. A. Huffman, known to me to be the person whose name is subscribed to the foregoing and attached instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, at Fort Worth, Texas, this 21st day of April, A. D. 1887.

(Signed) THOMAS P. MARTIN,
[SEAL.] *Notary Public, Tarrant Co., Texas.*

14 THE STATE OF TEXAS }
County of Tarrant. }

Before me, Thomas P. Martin, a notary public in and for Tarrant county, Texas, on this day personally appeared J. P. Smith, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, at Fort Worth, Texas, this 30th day of April, A. D. 1887.

(Signed) THOMAS P. MARTIN,
Notary Public, Tarrant County, Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, Thomas P. Martin, a notary public in and for Tarrant county, Texas, on this day personally appeared Jno. D. Templeton, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, at Fort Worth, Texas, this 30th day of April, A. D. 1887.

(Signed) THOMAS P. MARTIN,
Notary Public, Tarrant County, Texas.

(Endorsed :) Charter of the Fort Worth City Company.- Filed in the department of state May 9th, A. D. 1887. (Signed) J. M. Moore, secretary of state.

15 *Plaintiff's 1st Supplemental Petition. Filed June 17, 1891.*

In United States Circuit Court, in Northern District of Texas, at Dallas.

THE SMITH BRIDGE COMPANY
vs.
THE FT. WORTH CITY COMPANY. } No. 1339.

Now comes the Smith Bridge Company, by leave of the court, and files this its first supplemental petition in reply to defendant's 1st amended answer, filed on the 17th day of June, 1891, and says:

1st. Plaintiff excepts to the special answers of defendant in said answer contained and to each of them, taken separately, and says that the same and each of them, taken separately, are insufficient in law and show no cause of defence to plain'ff's action, and of this plaintiff prays the judgment of the court.

GREENE & HUMPHREYS,
Solicitors for said Plaintiff.

2nd. Plaintiff excepts to the special answer therein contained, wherein the said defendant attempts to avoid the contract, for the breach of which this action is brought, upon the ground that said defendant, being a corporation, had no authority under its charter to make and enter into said contract, and no authority to contract to deliver to plaintiff the bonds provided for in said contract, and that the same was *ultra vires* as to said defendant, because said pleading is insufficient in law and fails to show such facts which, if true, would authorize the court in finding that the contract sued on or any part of it was *ultra vires* as to the defendant, and of

16 this exception plaintiff prays the judgment of the court.

GREENE & HUMPHREYS,
Solicitors for said Plaintiff.

And, specially excepting to that part of defendant's answer in which it is set up that said bridge contracted to be built by plaintiff was not completed in the time contracted to be completed, plaintiff says that the same is insufficient in law, in this:

1st. Defendant does not allege that any notice was given to plaintiff that time was of the essence of the contract, or that plaintiff knew that it was so, or that defendant would not have entered into the contract had not it been so.

2nd. Defendant does not show how or in what manner it was damaged by plaintiff's failure to complete said bridge in the time specified or in what manner it would have been benefited by the completion of the bridge at an earlier date than it was in fact completed, and of these exceptions plaintiff prays the judgment of the court.

3rd. That the allegations of damages made by defendant are vague, uncertain, and speculative.

4th. That no amount of damages are alleged and no data given by which the same could be computed.

3rd. And, further replying to said special answers of the defendant, plaintiff says that it made and entered into the contract sued on in this cause with the defendant in good faith, and executed and performed all and singular the obligations by said contract required of it; that it expended large sums of money in and about the performance of its obligations under said contract, and that said contract was by it fully and entirely executed and completed prior to the bringing of this suit and was received and accepted in the manner and by the parties as provided in said contract; that
17 this was all done without objection or remonstrance on behalf of the part of said defendant or any of its stockholders; that the said defendant owns a large tract of land on the north side of the Trinity river, over which said bridge was built, which said tract of land defendant had prior to making the contract herein sued on subdivided into lots and blocks and was and still is offering the same for sale; that said river divided said land from the city of Fort Worth, and it was essential for proper, expeditious, and profitable accomplishment of the legitimate objects for which said defendant corporation was created, to wit, the sale of its said lands, that it have ready and direct means of access from the city of Fort Worth to its said lands, and that said defendant entered into said contract herein sued on with the plaintiff for the purpose of obtaining thereby ready and direct means of access from said city of Fort Worth to its said lands, and that said bridge so erected by the plaintiff under said contract did give to the defendant such access to said lands. Wherefore plaintiff says that said contract on the part of said defendant was not *ultra vires*, but was made directly for the purpose of accomplishing the legitimate objects of its creation, to wit, aiding it in the disposition and sale of its said lands; that immediately upon the completion of said bridge the North Side Street Railway Company (the stockholders in which company are for the most part the same stockholders in defendant's company) erected across and over said bridge so made by plaintiff a street railway connecting the said city of Fort Worth to the said lands of said defendant for the purpose, among other things, of aiding the said defendant in the disposition and sale of said lands; that said street railway company was in fact organized and operated in the interest of the said defendant for the purpose of bringing its said lands into market, and that by means of the erection
18 of said bridge and the running of said cars over the same and connecting Fort Worth thereby with the said lands of the defendant the value of the defendant's lands have been greatly enhanced and the sale thereof expedited. Wherefore plaintiff says that the said defendant, having made the contract with the plaintiff for the purposes aforesaid and having accepted and used the same as aforesaid and having caused plaintiff to expend large sums of money in carrying out the same, which has in all respects been executed by

the plaintiff, is estopped and cannot now be heard to plead want of power to execute said contract. Wherefore plaintiff prays for judgment as in its original petition.

GREENE & HUMPHREYS,
Solicitors for said Plaintiff.

And, further answering in this behalf, plaintiff says that the bonds mentioned in the contract herein sued on were in fact issued long prior to the making of said contract, and that at the time of the completion of said contract by the plaintiff a large number of said bonds, to wit, bonds of the par value of at least fifty thousand dollars, was then and there in the possession of said defendant and has ever since so remained in the possession of said defendant, and that the same could have been by the defendant delivered to the plaintiff at the time when they were to have been delivered under the terms of said contract had the defendant seen fit so to do.

Wherefore plaintiff prays for judgment as in its original petition.

GREENE & HUMPHREYS,
Solicitors for said Plaintiff.

19 And, further answering said special pleas in said answer contained, plaintiff says that it carried out its contract with the defendant in all things according to the terms and conditions therein, and to the satisfaction of the parties named therein; that *that* time was not of the essence of said contract, and that while it is true that said bridge was not completed at the date specified in its contract, yet the said failure to complete the bridge in said time was not because of any fault or default on the part of this plaintiff; that the said city of Fort Worth, under the term- of the several contracts made with reference to said bridge, had the right and authority to control said construction of said bridge under the terms of said contracts; that the said city of Fort Worth was to have constructed, at its own costs and under its own direction, the abutments and approaches to said bridge; that it was necessary that the same be done before said bridge could be completed; that the said city of Fort Worth was delayed in the construction of said approaches and abutments, and that plaintiff completed said bridge as soon after the said approaches and abutments were completed by the said city of Fort Worth as it was possible to do, and without any -necessary delay, and that the delay in completing said bridge beyond the time mentioned in said contract was owing to said failure of the said city of Fort Worth to complete said approaches and abutments, and not by reason of any fault or default on the part of this plaintiff.

And plaintiff further says that the said defendant was in no way injured or damaged by any delay in the completion of said bridge, because the said bridge was in fact completed long before the same could in fact be used by the defendant, for that, according to the terms of said contract, said bridge was erected at a point across the Trinity river which was inaccessible from the south side

20 until a roadway was cut through the bluff to the south end

of the bridge, and until said roadway was cut the said bridge could not be used for traffic, and that said roadway was not in fact cut out and put in shape for use until long after said bridge was in fact completed; that it was no part of the obligation assumed by plaintiff to cut out said road, and that the same was to be done by the said city of Fort Worth.

Wherefore plaintiff says that the defendant was in no way injured or damaged by any delay that may have been made in the completion of said bridge, and plaintiff prays for judgment as in its original petition.

GREENE & HUMPHREYS,
Solicitors for said Plaintiff.

21 *Stipulation. Filed May* 20, 1891.

SMITH BRIDGE COMPANY
vs.
THE FT. WORTH CITY COMPANY. } No. 1339.

Suit pending in the U. S. C. court, Dallas, Texas.

1st. It is agreed that a jury be waived and the cause tried by the court without a jury.

2nd. That the cause be reset for trial June 16th, 1891.

TEMPLETON & CARTER,
Att'ys for Def't.
GREENE & HUMPHREYS,
Att'ys for Pl'ff.

22 *Judgment.*

THE SMITH BRIDGE COMPANY
vs.
THE FORT WORTH CITY COMPANY. } No. 1339.

JUNE 17TH, 1891.

On this day came on to be heard the above entitled cause. Then came the parties, plaintiff and defendant, by their attorneys, and announced ready for trial. Then came on to be heard the defendant's general and special exceptions to the plaintiff's petition, and, argument of counsel being heard thereon, it is the opinion of the court that the law is for the plaintiff.

It is therefore considered by the court that said exceptions and each of them be overruled; to which ruling of the court defendant excepts. Then came on to be heard plaintiff's exception to the defendant's first amended original answer, and, argument of counsel being heard, it is the opinion of the court that the law is for the defendant. It is therefore considered that said exceptions be overruled.

An- a jury in this cause being waived by written stipulation of the parties hereto, the matter in controversy, as well of fact as of

law, was submitted to the court, and the evidence and argument of counsel having been heard and fully understood, it is the opinion of the court that the law and facts are for the plaintiff.

It is therefore considered and adjudged by the court that the plaintiff, The Smith Bridge Company, do have and recover of and from the defendant, The Fort Worth City Company, a private corporation, the sum of nine thousand six hundred thirty-three and $\frac{2}{100}$ ($9,633.02) dollars, with interest thereon from this date at the rate of eight per centum per annum, besides all costs in this cause incurred and expended, for which execution may issue.

23 *Special Findings of Facts and Conclusions of Law. Filed June 29, 1891.*

SMITH BRIDGE COMPANY
vs.
FORT WORTH CITY COMPANY.

Suit pending in the United States circuit court for the northern district of Texas, at Dallas.

The court makes the following special findings of facts on the issues made in the case:

1. The defendant, The Fort Worth City Company, was at the time of making the contract with the plaintiff here sued on and is now a private corporation created and organized for the purchase, subdivision, and sale of lands in cities, towns, and villages under the general laws of the State of Texas relating to private corporations.

2. That on the 16th day of May, 1888, the city of Fort Worth, a municipal corporation of the State of Texas, entered into a contract with the plaintiff herein for the construction of a certain bridge on one of the streets of said city where it crosses the Trinity river in said city, it being provided in the said contract that one-third of the contract price of said bridge—that is, eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents—should be paid by the defendant herein and a like amount by Tarrant county, which is also a municipal corporation of said State, the bridge to be completed on or before the first day of November, 1888, the plaintiff being required to give a bond within twenty days from the 16th day of May, 1888, payable to said city, in the sum

24 of ten thousand dollars, for the completion of said bridge on or before November 1st, 1888, in accordance with certain specifications, said bonds to be made a part of the contract with said city.

3. That on the 19th day of May, 1888, the president and secretary of the defendant corporation, owning together eighty-eight per cent. of its stock, executed a contract in its name obligating it to pay said sum of $8,166.66$\frac{2}{3}$ cents in the joint first-mortgage bonds of the defendant and the North Side Railway Company, another separate and distinct corporation, in which said president and secre-

tary owned likewise said per cent. of stock, said bonds secured on the lands, franchises, and possession of both said corporations, the said bonds to be delivered on the building of said bridge, according to the terms of the said contract between plaintiff and defendant and the said contract between plaintiff and the city of Fort Worth, to the acceptance of the street and alley committee and the city engineer of said city and the turning of the same over to the said city, completed, in accordance with the above-mentioned contracts and the contract between plaintiff and Tarrant county.

4. That the bridge was not completed and turned over to the city of Fort Worth until the 19th day of March, 1889, but the delay was caused neither by the plaintiff nor the defendant herein, but altogether by the city of Fort Worth, and time was not of the essence of the contract.

5. That the said bridge was to be and is a part of a public street of the incorporated city of Fort Worth, and the defendant was not to have nor has it ever had any property interest in or control over the same or a use of it, except as a part of the general public.

6. That the defendant was not damaged by the delay in the completion of the bridge.

7. That the bridge, when completed and turned over to the
25 said city, was in substantial compliance with the contracts mentioned herein.

8. That a proper demand was made by the plaintiff on the defendant for the delivery of the said bonds, and the defendant refused to deliver the same on demand.

9. That Tarrant county and Fort Worth paid their proportional part of the sum of ——.

10. That the bridge was expected to enhance the value of the property owned by the defendant by furnishing another made of access thereto from the city of Fort Worth.

Conclusions of Law.

From the foregoing findings of fact the conclusions of law are as follows:

1st. That the defendant had the power to make the contract here sued on, and that the same is therefore legal, valid, and binding upon it.

2. That the plaintiff is entitled to judgment in this court for the sum of eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents, with eight per cent. interest from the 19th day of March, 1889.

A. P. McCORMICK, *Judge.*

26 *Agreement. Filed July* 3, 1891.

SMITH BRIDGE COMPANY
vs.
FORT WORTH CITY COMPANY.

Honorable A. P. McCormick, judge:

In the above case, by your leave, we desire to submit a statement of the evidence bearing on the 10th finding of the facts which we have submitted to you. This finding relates to the necessity to construct the bridge in controversy to enable the defendant to carry out the purposes for which it was chartered.

A. T. Byers testified that he was secretary of the defendant company before and at the time of the execution of the contract sued on, and that W. A. Huffman was president of said company, and that he and Huffman each owned 44 % of and that J. P. Smith owned 12 % of the stock of said company—the stock of the Fort Worth City Company; that the stockholders of the Fort Worth City Company and the North Side Street Railway Company were identical.

That prior to the execution of the contract sued on it was discussed among the directory of the defendant company the propriety of laying a street railway over the bridge to be built, and that it was one of the objects in having the bridge built and in entering into the contract sued on to have a street-car line run over said bridge through the lands of defendant; that the bridge in question was built, and that, before the completion of the same, the North Side Street Railway Company laid two tracks on the bridge, and, after its completion, ran cars over said bridge for about one year,

27 until the bridge gave way, directly through the lands of said Forth Worth City Company; that the bridge in question was thirty-four feet wide and connected the main street of Fort Worth with an extension of said main street on the north side of the river, and made a direct route to defendant's property from said city of Fort Worth, and that if said bridge had not given away that it would have greatly assisted in the sale of the lands of said Fort Worth City Company.

Witness testified that there was another bridge up the river something over 400 feet above the bridge in question, which was 16 feet wide, and which landed on the north side of the river, on the defendant's land; that the same was an old bridge and was condemned by the city about the time of the completion of the new bridge; that at some time prior to the contract for the building of the new bridge defendant company had obtained permission from the city of Fort Worth to build a street-car line over said old bridge; that said old bridge led from the city of Fort Worth out to the new cemet-ry of the city of Fort Worth through the yard of the St. Louis, Arkansas and Texas railway; that the said company's depot and yard was about 200 feet from said old bridge; that the main route from the city of Fort Worth to said cemet-ry was by way of said old bridge; was

down a very steep hill, which hill was a 10 % grade; that there was another route to said old bridge from the city of Fort Worth, which was a considerable distance around towards the western portion of the city, but that the grade was only a 3 % grade; that the bluff on the south side of the river, next to the city of Fort Worth, opposite defendant's property and at the place where said new bridge was built, was about 105 feet high, and that the grade to the new bridge and its approaches after completion was a 6 % grade, and that there were two approaches leading from said city to said new bridge in question on the south side and one approach on the north
28 side; that said bridge, with its approaches, reached from the top of the bluff on the south side to the level of the land on the north side of said river.

Witness thought that the old bridge was capable of sustaining the weight of passing street cars, as it had sustained heavier burdens in the way of freight wagons. Witness further testified that said new bridge, when completed and accepted, was the property of the city of Fort Worth, and that defendant company had no interest in the same; that the lands of the Fort Worth City Company laid on the north side of the river from the city of Forth Worth and opposite the bluff from which said new bridge was built; that there was also another bridge down the river about 2 miles from said new bridge in question on a straight line, which two-mile bridge was about one-fourth of a mile from the N. E. corner of defendant's land; that the road by way of the old bridge was kept up by the city of Fort Worth, and that all of said bridges were across the Trinity river, and that the city kept up the road to the cemet-ry, around which cemet-ry lies a considerable portion of defendant's land. Said road runs along the western boundary of defendant's said land.

Mr. Edrington testified that he lived in the city of Fort Worth, and had lived there nine years or longer; that ever since he came there the old bridge had been used for the purposes of crossing the Trinity river from the city of Fort Worth to the city cemet-ry; that the city had in 1887 a population of twenty thousand and now about twenty-five thousand.

That the approach to said old bridge was down a steep hill, but that the road to said bridge was considerably traveled, and that there was also another approach to said bridge, which was considerably out of the way, leading around through the western portion of the city; that said old bridge was about 16 feet wide, and witness
29 did not think vehicles could pass on said old bridge; that the old bridge was up the river about 150 yards above the new one; that said land was sufficient for the purposes of travel, and connected with the streets of the city of Fort Worth.

We have examined the above and agree that it sets out substantially the testimony of said two witnesses, Byers and Edrington.

This June 26th, 1891.

GREENE & HUMPHREYS,
Solicitors for Smith Bridge Co., Pl'ff.
JNO. D. TEMPLETON, *For the Def't.*

30 *Assignment of Errors. Filed June* 30, 1891.

In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas.

THE SMITH BRIDGE COMPANY
vs.
THE FORT WORTH CITY COMPANY. } No. —.

The plaintiff in error, The Fort Worth City Company, a corporation, comes and assigns as errors committed by the court on the trial of this cause, of which it here now complains and on account of which it asks a reversal of the judgment entered against it, the following:

1. The court erred in overruling the general and special demurrers or exceptions of the plaintiff in error to the sufficiency of the pleadings of the defendant in error, as shown by the judgment entered herein and the bill of exceptions.

2. The court found as a fact, as disclosed by finding No. one, that the plaintiff in error was created and organized as a corporation "for the purchase, subdivision, and sale of land in cities, towns, and villages under the general laws of the State of Texas relating to private corporations," and after so finding it found, as a matter of law and entered judgment accordingly, that the contract here sued on was within the powers of said corporation and legal, valid, and binding on it.

3. The court found as facts, as shown by findings number two, three, and four, that the city of Fort Worth on May 16th, 1888, entered into a contract with defendant in error to build a certain bridge in said city of Fort Worth, a municipal corporation of
31 the State of Texas, across Trinity river, in said city, for a certain consideration, a part of which was to be paid by the plaintiff in error; the balance by Tarrant county and the city of Fort Worth. The said bridge, under contract between the city of Fort Worth and the defendant in error and between the plaintiff in error and the defendant in error, was to be completed on or before the 1st day of November, 1888, and turned over to the city, a bond being required to be given by the defendant in error to complete the said bridge by said date in accordance with certain plans and specifications; that it was not completed until March 19th, 1889; that the said plaintiff in error did not cause the delay, and notwithstanding the said finding it rendered judgment against the plaintiff in error, which action of the court is here assigned as error.

4. The court found as a fact, as shown by finding No. 5, that the bridge was to be and is a part of a public street of the city of Fort Worth; that the defendant was not to have and that it had never had any control over it or any interest in it, except as part of the general public, but notwithstanding this finding it entered judgment against the plaintiff in error; which action of the court is here assigned as error.

5. The defendant in error in its petition pleaded an exact compliance with the contract for the erection and completion of the said bridge, and the court, as shown by finding No. 7, found as a fact that it was completed only in substantial compliance with the said contract, but it nevertheless entered a judgment against the plaintiff in error; which action of the court is here assigned as error.

6. The court found as a fact that the bridge was expected to enhance the value of the property of the plaintiff in error by furnishing another mode of access thereto from the city of Fort Worth (see finding No. 10), but after making this finding of fact it
32 found as a conclusion of law that the plaintiff in error had the right under its charter to make the contract here sued on, and that the same was therefore legal, valid, and binding on it, and so entered judgment; which action of the court is now here assigned as error.

TEMPLETON & CARTER,
Att'ys for Pl'ff in Error.

33 *Petition for Writ of Error and Allowance. Filed June* 30, 1891.

Circuit Court of the United States for the Northern District of Texas.

SMITH BRIDGE COMPANY
vs.
FORT WORTH CITY COMPANY.

The above-named defendant, The Fort Worth City Company, conceiving itself to be aggrieved by the order entered on the 17th day of June, 1891, in the above-entitled proceedings, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that this appeal may be allowed; that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

TEMPLETON & CARTER,
Att'ys for Fort Worth City Company, Pl'ff in Error in this Case, 212 Main Street, Fort Worth, Texas.

DALLAS, TEXAS, *June 30th*, 1891.

And now, to wit, on June 30th, 1891, it is ordered that the writ of error be allowed as prayed for.

A. P. McCORMICK,
District Judge, Northern District of Texas.

34 *Supersedeas Bond. Filed June* 30, 1891.

Circuit Court of the United States of America for the Northern District of Texas and Fifth Circuit.

FORT WORTH CITY COMPANY, Appellant,
vs.
SMITH BRIDGE COMPANY, Respondent.

Know all men by these presents that we, The Fort Worth City Company, appellant, and Mrs. Sallie Huffman and —— ——, all of the city of Fort Worth, in the county of Tarrant and State of Texas, are held and firmly bound unto the above-named Smith Bridge Company in the sum of thirteen thousand dollars, to be paid to the said Smith Bridge Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Forth Worth City Company has prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled suit by the district judge of the northern district of Texas:

Now, therefore, the condition of the above obligation is such that if the above-named Fort Worth City Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

35

FORT WORTH CITY COMPANY,
By WALLACE HENDRICKS, *Pres't.* [L. S.]
SALLIE HUFFMAN. [L. S.]
A. T. BYERS. [L. S.]

Attest: GEO. B. HENDRICKS, *Sec'y.*

Approved:
A. P. McCORMICK,
U. S. Dist. Judge.

STATE OF TEXAS,
Tarrant County.

Before me, C. M. Templeton, a notary public in and for Tarrant county, Texes, on this day personally appeared Mrs. Sallie Huffman and A. T. Byers, known to me to be the persons whose names are subscribed to the foregoing instrument of writing, and acknowledged to me that they had each signed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 30th day of June, 1891.

[SEAL.] C. M. TEMPLETON,
Notary Public, Tarrant County, Texas.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Smith Bridge Co. as plaintiff and The Fort Worth City Company is respondent, a manifest error hath happened, to the great damage of the said Fort Worth City Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 4th Monday of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of the Circuit Court of the United States,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] 1339c. Smith Bridge Co. *v.* Fort Worth City Co. Writ of error. Filed June 30, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

37 & 38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Smith Bridge Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the (4) fourth Monday of July, 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the n[illegible]-

ern district of Texas, wherein The Fort Worth City Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Herein fail not, but due service and return hereof make within thirty days from the date hereof.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

A. P. McCORMICK,
District Judge.

We, as attorneys of record for the def't in error, The Smith Bridge Company, accept service of the foregoing citation.

This the 9th day of July, A. D. 1891.

GREENE & HUMPHREYS,
Att'ys of Record for Defendant in Error.

[Endorsed:] 1339c. The Smith Bridge Co. *v.* Fort Worth City Co. Citation in error and acceptance of service. Filed July 1, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

39 *Bills of Exception. Filed July* 2, 1891.

In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas, Texas.

THE SMITH BRIDGE COMPANY
vs.
THE FORT WORTH CITY COMPANY. } No. —.

No. 1.

Be it remembered that on the trial of the above cause the plaintiff in error demurred generally to the petition of the defendant in error, for that it showed no cause of action against the plaintiff in error, and it excepted specially to the said petition, for that it failed to disclose the purpose or purposes for which the plaintiff in error was created, and for that it failed to show the purpose or purposes for which the defendant in error was created and organized, and it further specially excepted, for that the defendant in error's petition showed that the contract sued on was made and entered into for the benefit of the county of Tarrant and the city of Fort Worth, both municipal corporations of the State of Texas, without disclosing any power or authority in the plaintiff in error to so use its funds, assets, bonds, and property, and without disclosing why the defendant is bound by such pretended contract. All the said exceptions were by the court overruled, and the defendant then and there ex-

cepted to the said rulings of the court and tendered this bill and prayed that the same be signed and sealed, which was accordingly done.

A. P. McCORMICK,
U. S. District Judge.

40 In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas, Texas.

THE SMITH BRIDGE COMPANY
vs.
THE FORT WORTH CITY COMPANY. } No. —

No. 2.

Be it remembered that on the trial of this cause the court, being requested by counsel for the plaintiff in error to make special findings of fact, made its findings and filed the same on, to wit, the 29th day of June, 1891, the said findings being as follows:

"The court makes the following special findings of facts on the issues made in the case:

1. The defendant, The Fort Worth City Company, was at the time of making the contract with the plaintiff here sued on and is now a private corporation created and organized for the purchase, subdivision, and sale of land in cities, towns, and villages under the general laws of the State of Texas relating to private corporations.

2. That on the 16th day of May, 1888, the city of Fort Worth, a municipal corporation of the State of Texas, entered into a contract with the plaintiff herein for the construction of a certain bridge on one of the streets of said city where it crosses the Trinity river in said city, it being provided in the said contract that one-third of the contract price of said bridge—that is, eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents—should be paid by the defendant herein and a like amount by Tarrant county, which is also a municipal corporation of said State, the bridge to be completed on or before the first day of November, 1888, the
41 plaintiff being required to give a bond within twenty days from the 16th day of May, 1888, payable to said city, in the sum of ten thousand dollars, for the completion of said bridge on or before November 1st, 1888, in accordance with certain specifications, said bond to be made a part of the contract with the said city.

3. That on the 19th day of May, 1888, the president and secretary of the defendant corporation, owning together eighty-eight per cent. of its stock, executed a contract in its name, obligating it to pay said sum of $8,166.66⅔ cents in the joint first-mortgage bonds of the defendant and the North Side Railway Company, another separate and distinct corporation, in which said president and secretary owned likewise said per cent. of stock, said bonds secured on the lands, franchises, and possessions of both corporations, the said bonds to be delivered on the building of said bridge according to *to* the terms of the said contract between plaintiff and defendant

and the said contract between plaintiff and the city of Fort Worth to the acceptance of the street and alley committee and the city engineer of said city, and the turning of the same over to said city completed in accordance with the above-mentioned contracts and the contract between plaintiff and Tarrant county.

4. That the bridge was not completed and turned over to the city of Fort Worth until the 19th day of March, 1889, but the delay was caused neither by the plaintiff nor the defendant herein, but altogether by the city of Fort Worth, and time was not of the essence of the contract.

5. That the said bridge was to be and is a part of a public street of the incorporated city of Fort Worth, and the defendant was not to have nor has it ever had any property interest in or control over the same or use of it, except as a part of the general public.

6. The defendant was not damaged by the delay in the completion of the bridge.

42 7. That the bridge when completed and turned over to the said city was in substantial compliance with the contracts mentioned herein.

8. That a proper demand was made by the plaintiff on the defendant for the delivery of the said bonds, and the defendant refused to deliver the same on said demand.

9. That Tarrant county and Fort Worth paid their proportional part of the sum of —.

10. That the bridge was expected to enhance the value of the property owned by the defendant by furnishing another mode of access thereto from the city of Fort Worth."

And on the findings of fact the conclusions of law are as follows:

1. That the defendant had the power to make the contract here sued on, and that the same is therefore legal, valid, and binding upon it.

2. That the plaintiff is entitled to judgment in this court for the sum of eight thousand one hundred and sixty-six dollars and sixty-six and two-thirds cents, with eight per cent. interest from the 19th day of March, 1889.

And upon the said findings of fact and conclusions of law it entered judgment against the plaintiff in error for the sum of $8,166.66⅔, with eight per cent. interest thereon from the 19th day of March, 1889; to which action of the court in entering the said judgment on the said findings of fact in favor of the def't in error instead of a judg't in favor of pl'ff in error the plaintiff in error then and there excepted and tendered this bill of exceptions and asked that the same be signed and sealed and made a part of the record herein, which was accordingly done.

A. P. McCORMICK,
U. S. District Judge.

43 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States, in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause No. 1339, wherein The Smith Bridge Company is plaintiff and The Fort Worth City Company is defendant, except that the original citation in and writ of error are included therein instead of the copies thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand officially and the seal of said court, at Dallas, Texas, this 16th day of July, 1891.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Endorsed on cover: Case No. 14,760. N. Texas C. C. U. S. No. 851. The Fort Worth City Company, plaintiff in error, *vs.* The Smith Bridge Company. Filed July 22, 1891.

565

SEP 6 1893

ULTRA VIRES CORPORATION CONTRACT.

In Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

FORT WORTH CITY COMPANY, PLAINTIFF IN ERROR,

vs.

SMITH BRIDGE COMPANY, DEFENDANT IN ERROR.

BRIEF AND NOTES OF ARGUMENT FOR PLAINTIFF IN ERROR BY THOS. P. MARTIN.

GIBBS PRINTING AND LITHOGRAPHING CO.

In Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

FORT WORTH CITY COMPANY, PLAINTIFF IN ERROR,

vs.

SMITH BRIDGE COMPANY, DEFENDANT IN ERROR.

ERRORS TO THE CIRCUIT COURT OF U. S. FOR NORTHERN DISTRICT OF TEXAS.

The defendant in error, the Smith Bridge Company, brought this suit in the U. S. Circuit Court for the Northern District of Texas, against the Fort Worth City Company. The plaintiff was a private corporation, incorporated under the laws of the State of Ohio, and had its domicile in the City of Toledo, in said State; the defendant was a private coporation, incorporated under the laws of the State of Texas, and had its domicile in the City of Fort Worth, in said State.

Plaintiff alleged that on the 19th day of May, 1888, plaintiff and defendant entered into a certain contract, whereby plaintiff, the Smith Bridge Company, for the consideration of eight thousand, one hundred and sixty-six dollars and sixty-six

cents, agreed to be paid to it by the Fort Worth City Company, agreed to build for said Fort Worth City Company a bridge across the Trinity River, in said City of Fort Worth, at a point just north of the public square in said city, at a point to be designated by the city engineer of said city. The petition alleged that the superstructure, road way, proportions, side-walks, all materials, works and furnishings of every kind and every part of said bridge were to be built and constructed in accordance with specifications furnished by the City Engineer of the City of Fort Worth.

The contract price of the bridge was alleged to be $24,500.00, and that the City of Fort Worth and the County of Tarant, of said State of Texas, had agreed with the Smith Bridge Company to pay one-third each of the cost of said bridge. It was alleged in the petition that the county of Tarrant and the city of Fort Worth each signed said contract and each paid their proportion of the cost of said bridge. That the plaintiff built and constructed said bridge according to said contract. The consideration to be paid by the Fort Worth City Company was contracted to be paid in the first mortgage bonds of the said company, and the North Side Railway Company. It was alleged that the defendant failed and refused to deliver the said bonds and that they were of the face value of eight thousand one hundred and sixty-six dollars and sixty-six cents. Plaintiff sued for damages for failure to deliver these bonds. (Tr., pp. 1 to 4.)

Defendant answered by way of demurrer and special exception, and said that the petition did not disclose the purposes for which the plaintiff and the defendant corporations were incorporated. Second, that the petition did not disclose any power or authority in the defendant corporation to use its funds, assets, bonds and property for the purpose of constructing said bridge. A general denial and also a plea of *ultra vires*, wherein the defendant asserted the contract sued upon to be without authority upon the part of the board of directors and the officers of the said Fort Worth City Company, and that the purpose for which said company was organized was the purchase and sub-division and sale of lands in cities, towns and villages, as authorized by Art. 566, Revised Statutes of the State of Texas.

That the bridge in question was to be, and was, built upon one of the public streets of the City of Fort Worth; that the Fort Worth City Company was not to, nor did it ever, have any property in the same, or other rights to occupy and use the same than such as the public in general had; therefore the contract was one upon which plaintiff was not entitled to recover. (Tr., pp. 5–9.)

The plaintiff filed exceptions to this answer, also special plea in replication, alleging that it made the contract with the defendant in good faith, and executed and performed all and singular the obligations in said contract, and that while the bridge in question was not built upon the lands of the Fort Worth

City Company, but upon one of the public streets of the City of Fort Worth, the use of the bridge by the public would be to enhance the value of the property of the Fort Worth City Company. (Tr., pp. 9–12.)

The Circuit Court overruled the general and special exceptions of the defendant to the plaintiff's petition, and the defendant excepted to the ruling of the court. Plaintiff's exceptions to the defendant's amended answer were overruled.

A jury was waived by the parties in writing and matters of fact, as well as of law, were submitted to the court.

After hearing the evidence and argument of counsel, the court rendered judgment in favor of the Smith Bridge Company against the Fort Worth City Company for $9,633.02, with eight per cent interest on the judgment. (Tr., pp. 12, 13.)

The court made and tendered its special findings in the cause, which were as follows:

1st. "The defendant, the Fort Worth City Company, was at the time of making the contract here sued on, and is now, a private corporation created and organized for the purchase, subdivision and sale of lands in cities, towns and villages under the general laws of the State of Texas relative to private corporations.

2nd. "That on the 16th day of May, 1888, the City of Fort Worth, a municipal corporation of the State of Texas, entered into a contract with the plaintiff herein for the construction of a certain bridge on one of the streets of said city where

it crosses the Trinity River in said city, it being provided in the said contract that one-third of the contract price of said bridge—that is, eight thousand one hundred and sixty-six dollars and sixty-six cents and two-thirds of a cent—should be paid by the defendant herein and a like amount by Tarrant County, which is also a municipal corporation of said State, the bridge to be completed on or before the first day of November, 1888, the plaintiff being required to give bond within twenty days from the 16th day of May, 1888, payable to said city in the sum of ten thousand dollars, for the completion of said bridge on or before November 1, 1888, in accordance with certain specifications, said bond to be made a part of the contract with said city.

3rd. "That on the 19th day of May, 1888, the president and secretary of the defendant corporation, owning together eighty-eight per cent of its stock, executed a contract in its name, obligating it to pay said sum of $8,166.66\frac{2}{3}$ cents in the joint first mortgage bonds of the defendant and the North Side Railway Company, another separate and distinct corporation, in which said president and secretary owned likewise said per cent of stock, said bonds secured on the lands, franchises, and possessions of both said corporations, the said bonds to be delivered on the building of said bridge according to the terms of said contract between plaintiff and defendant, and the said contract between plaintiff and the City of Fort Worth, to the acceptance of the street and alley committee and the city engineer of said city, and the

turning over of the same to the city, completed, in accordance with the above mentioned contracts and the contract between plaintiff and Tarrant County.

4th. "That the bridge was not completed and turned over to the city of Fort Worth until the 19th day of March, 1889, but the delay was caused neither by the plaintiff nor the defendent herein, but altogether by the city of Fort Worth, and time was not of the essence of the contract.

5th. "That the said bridge was to be, and is, a part of a public street of the incorporated city of Fort Worth, and the defendant was not to have, nor has it ever had, any property interest in or control over the same, or use of it, except as part of the general public.

6th. "That the defendant was not damaged by the delay in the construction of the bridge.

7th. "That the bridge, when completed and turned over to the said city, was in substantial compliance with the contracts mentioned herein.

8th. "That a proper demand was made by the plaintiff on the defendant for the delivery of said bonds, and the defendant refused to deliver same on demand.

9th. "That Fort Worth and Tarrant County paid their proportional part of the sum of $———

10th. "That said bridge was expected to enhance the value of the property owned by the defendant by furnishing another mode of access thereto from the city of Fort Worth."

Conclusions of Law.

From the foregoing conclusions of fact, the conclusions of law are as follows:

1st. "The defendant had the right to make the contract here sued on, and that the same is therefore legal, valid and binding upon it.

2nd. "That plaintiff is entitled to judgment in this court for the sum of eight thousand one hundred and sixty-six dollars and sixty-six and two-third cents, with interest at eight per cent from the 19th day of March, 1889."

[Signed.] A. P. McCORMICK, *Judge.*

The plaintiff in error duly excepted to the conclusions of fact and law as found by the court, and its judgment thereon. (Record, pp. 22 and 23.)

The parties to the cause filed a stipulation which was as follows:

"HONORABLE A. P. McCORMICK, JUDGE:

"In the above case, by your leave, we desire to submit a statement of the evidence bearing on the 10th finding of facts which we have submitted to you. This finding relates to the necessity to construct the bridge in controversy to enable the defendant to carry out the purposes for which it was chartered.

A. T. Byers testified that he was secretary of the defendant company before and at the time of the execution of the contract sued on, and that W. A. Huffman was president of said company, and that he and Huffman each owned 44 per per cent of,

and that J. P. Smith owned 12 per cent of, the stock of said company—the stock of the Fort Worth City Company; that the stockholders of the Fort Worth City Company and the North Side Railway Company were identical.

That prior to the execution of the contract sued on, it was discussed among the directory of the defendant company the propriety of laying a street railway over the bridge to be built, and in entering into the contract sued on to have a street car line run over said bridge through the lands of defendant; that the bridge in question was built, and that, before the completion of the same, that North Side Railway Company laid two tracks on the bridge, and after its completion run cars over said bridge for about one year, until the bridge gave way, directly through the lands of said Fort Worth City Company; that the bridge in question was thirty-four feet wide and connected the main street of Fort Worth with an extention of said main street on the north side of the river, and made a direct route to defendant's property from said city of Fort Worth, and that if said bridge had not given away that it would have greatly assisted in the sale of the lands of said Fort Worth City Company.

Witness testified that there was another bridge up the river something over four hundred feet above the bridge in question, which was sixteen feet wide, and which landed on the north side of the river, on the defendant's land; that the same was an old bridge and was condemned by the city about the time of the

completion of the new bridge; that at some time prior to the contract for the building of the new bridge defendant company had obtained permission from the city of Fort Worth to build a street car line over said old bridge; that said old bridge led from the city of Fort Worth out to the new cemetery of the city of Fort Worth through the yards of the St. Louis, Arkansas & Texas Railway Company; that the said company's depot and yard was about two hundred feet from said old bridge; that the main route from the city of Fort Worth to said cemetery was by way of said old bridge; was down a very steep hill, which hill was a ten per cent. grade; that there was another route from the city of Fort Worth to said old bridge, which was a considerable distance around towards the western portion of the city, but that the grade was only a three per cent. grade; that the bluff on the south side of the river, next to the city of Fort Worth, opposite defendant's property, and at the place where said new bridge was built, was about 105 feet high, and that the grade to the new bridge and its approaches after completion was a six per cent. grade, and that there were two approaches leading from the city of Fort Worth to said new bridge in question on the south side and one approach on the north side; that said bridge with its approaches reached from the top of the bluff on the south side to the level of the land on the north side of the river.

Witness thought that the old bridge was capable of sustaining the weight of passing street cars, as it had sustained heav-

ier burdens in the way of freight wagons. Witness further testified that said new bridge, when completed and accepted, was the property of the city of Fort Worth, and that defendant company had no interest in same; that the lands of the Fort Worth City Company laid on the north side of the river from the city of Fort Worth and opposite the bluff from which said new bridge was built; that there was also another bridge down the river about two miles from said new bridge in question on a straight line, which two-mile bridge was about one fourth of a mile from the north east corner of defendant's land; that the road way by way of the old bridge was kept up by the city of Fort Worth, and that all of said bridges were across Trinity river, and that the city kept up the road to the cemetery, around which cemetery lies a considerable portion of defendant's land. Said road runs along the western boundary of defendant's land.

Mr. Edrington testified that he lived in the city of Fort Worth and had lived there nine years or longer; that ever since he came there the old bridge had been used for the purposes of crossing the Trinity river from the city of Fort Worth to the city cemetery; that the city had in 1887 a population of about twenty thousand, and now about twenty-five thousand.

That the approach to said old bridge was down a steep hill, but that the road to said old bridge was considerably traveled, and that there was also another approach to said old bridge, which was considerably out of the way, leading around through

the western portion of the city; that said old bridge was about sixteen feet wide, and witness did not think that vehicles could pass on said old bridge; that the old bridge was up the river about one hundred and fifty yards above the new one; that said land was sufficient for the purposes of travel, and connected with the streets of the city of Fort Worth.

"We have examined the above and agree that it sets out substantially the testimony of said two witnesses, Byers and Edrington." This June 26th, 1891.—Greene & Humphreys for Smith Bridge Co., plaintiff, John D. Templeton, for the defendant. (Tr., pp. 15–16.)

The Fort Worth City Company on the, 30th day of June, 1891, sued out a writ of error, which was allowed, and on said day gave a supersedeas bond, (Tr., pp. 18–19,) and brings the same before this court for revision.

The plaintiff in error assigned the following errors in said cause, to-wit:

1st. The court erred in overruling the general and special demurrers, or exceptions, of the plaintiff in error to the sufficiency of the pleadings of the defendant in error, as shown by the judgment herein and bill of exceptions. (Tr., p. 17.)

Proposition under this Assignment:

Plaintiff's petition on its face disclosed the fact that defendant had contracted to pay plaintiff for the building of a bridge upon one of the public highways of the city of Fort Worth, and it was no where alleged in said petition, or in the replication,

that the bridge in question was built for the benefit of the defendant corporation, save and except as a member of the general public. Therefore, the petition showed upon its face that the defendant corporation had no power to make the contract sued upon.

Article 589 of the Revised Statutes of Texas reads as follows:

"*Art. 589—Corporation Limited by its Charter.*—No corporation created under the provisions of this statute shall employ its stock, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its incorporation."

This is the common law and applies to all corporations.

We think the contract in question is inhibited by the law of the State of Texas.

AUTHORITIES.

Pittsburgh & Cincinnati & St. Louis Ry. Co. vs. Keokuk & Hamilton Bridge Co., 131—U. S. Rep., 157.

Pearce vs. Railway Co., 20 How. U. S., 443.

Old Colony R. R. Co. vs. Davis, 41 Am. Rep., 223.

Second Assignment of Error:

The court finds as fact, as disclosed by finding of fact p. 1, that the plaintiff in error was created and organized as a corporation for the purchase, sub-division and sale of lands in cities, towns and villages, under the laws of the State of Texas, relating to private corporations, and, after so finding, finds as a

matter of law, and rendered judgment accordingly, that the contract here sued upon was within the powers or the said corporation, and was legal, valid and binding upon it. (Tr., p. 17.)

This assignment of error raises the proposition that if a corporation is created for the purchase, sub-division and sale of lands in cities, towns and villages, under the general laws of the State of Texas, it may not contract a debt to construct a bridge for a city, which debt might sweep away the entire corporate assets, and that the contract so made would not be within the powers of such corporation.

AUTHORITIES.

The same heretofore cited, and Field on Corporations, p. 303, last part of Sec. 270; Beach on Corportions, 421 to 438.

Third Assignment of Error:

The court found as a fact, as shown by findings, pp. 2, 3 and 4, that the city of Fort Worth, on May 16th, 1888, entered into a contract with defendant in error to build the bridge in question in the city of Fort Worth, a municipal corporation of the State of Texas, for a certain consideration, a part of which was to be paid by the plaintiff in error, the balance to be paid by Tarrant County, Texas, and the city of Fort Worth. The said bridge under the said contract between the city of Fort Worth and the defendant in error, and the plantiff in error and the defendant in error, was to be completed on or before the 1st day of November, 1888, and turned over to the city, a bond

being required to be given by defendant in error to complete the said bridge by said date in accordance with certain plans and specifications; that said bridge was not completed until March 17th, 1889, and that the plaintiff in error did not cause the delay, and notwithstanding such finding rendered judgment against the plaintiff in error, which action of the court is here assigned as error.

Fourth Assignment of Error:

The court found as a fact, as shown by finding p. 5, that the bridge in question was to be, and is, a part of a public street of the city of Fort Worth; that the plaintiff in error was not to have, nor did it ever have, any control over or interest in the same, except as a part of the general public, but notwithstanding such finding the court rendered judgment against the plaintiff in error, which action of the court is here assigned as error.

See authorities cited in this brief.

Fifth Assignment of Error:

The court found as a fact that the bridge in question was expected to enhance the value of the property of the plaintiff in error by furnishing another mode of access thereto from the city of Fort Worth (see finding p. 10), but after finding this fact, it found as a conclusion of law that the plaintiff in error had the right under its charter to make the contract here sued on, and that the same was therefore legal, valid and binding

on it, and so entered judgment, which action of the court is here assigned as error. (Tr., p. 18.)

In the case of P. C. & St. L. Ry. Co. vs. Keokuk & Hamilton Bridge Co. the Supreme Court of the United States, speaking through Justice Gray, said: "The outlines of the doctrine of *ultra vires*, and the reasons on which it rests, have been clearly stated in previous judgments of this court. The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the power conferred upon it by the legislature, and varying from the objects of its creation as declared in the law of its organization, are: (1) the interest of the public that the corporation shall not transcend the powers granted; (2) the interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; (3) the obligation of every one entering into a contract with a corporation, to take notice of the legal limits of its powers. These three reasons are clearly brought out in the unanimous judgment of this court, delivered by Mr. Justice Campbell in the leading case of Pearce vs. Railroad Co. 21 How., 441, in which it was held that a railroad corporation was not liable to be sued upon promissory notes which it had given in payment for a steam boat received and used by it and running in connection with its railroad. So it has been repeatedly adjudged by this court that a lease made by one corporation to another, either of which is not expressly

authorized by law to enter into the lease, is *ultra vires* and void. Thomas vs. Railroad Co. 101 U. S. 71; Pennsylvania Railroad Co. vs. Railroad Co., 118 U. S., 290, 630; Oregon Railway Co. vs. Oregonian Railway, 130 U. S. 1.

"But while the charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation, yet, whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as *incidental* to the objects for which the corporation is created, is not to be taken as prohibited. Accordingly, where the charter of a railroad corporation, or the general laws applicable to it, manifest the intention of the legislature, for the purpose of securing a continuous line of transportation of which its road forms part, to confer upon it the power of making contracts with other railroad or steamboat corporations to promote that end, such contracts are not *ultra vires*. Railroad Co. vs. Steamboat Co., 107 U. S., 98; see also Branch vs. Jesup, 106 U. S., 468, 478."

Section 6, Article 11 of the Constitution of the State of Texas, reads as follows: "That no corporation shall issue stocks or bonds except for money paid, labor done, or property actually received." * * * This section of the Constitution of the State of Texas, in connection with Article 589 of the Revised Statutes of the State of Texas, shows that the public policy of the State of Texas is to restrict corporations in the use of their

funds for the purposes for which they were incorporated, and that any direct or indirect use of the corporate funds and assets for any other purpose whatever than to accomplish the legitimate objects of the corporation, would be against public policy.

The Fort Worth City Company, the corporation sued in this case, was incorporated under the general laws of the State of Texas for the purchase, sub-division and sale of lands in cities, towns and villages, as authorized by Article 566 of the Revised Statutes, as amended by Chapter 61 of the Laws of 1885. The 6th sub-division of said chapter is as follows:

"Article 6.—The purposes for which a private corporation may be formed are: * * * 6th Sub-division—For the purpose of the purchase, sub-division and sale of land in cities, towns and villages."—General Laws of the State of Texas; act approved March 27th, 1885.

The object of allowing these corporations to be formed for the purchase, sub-division and sale of lands in cities, towns and villages, was to enable the people of the State of Texas to lay off, plot and sub-divide land into town lots and blocks for homes, and to encourage the ownership of homes by its people.

If the object or tendency of the agreement sued upon is against the public policy of the State of Texas, as is manifest from the constitutional provisions and the general laws above quoted, then the contract sued upon is invalid. Mr. Greenhood in his treatise on public policy says: "It is the object or ten-

dency of such agreements (against public policy) which determines their validity, not their actual effects." Page 189, Sub-rule 1.

If this is the test, it cannot be doubted that the results which might flow from the enforcement of the contract under investigation might be to sacrifice the entire corporate assets of the Fort Worth City Company to pay off the debt for the building of the bridge in question. If the contract executed was carried to its legitimate consequences, would not it be against public policy? We can see no difference in this case in its principle and the case of Pierce vs. Railway Company, 20 Howard (U. S.), page 443. If a railway company cannot contract for steamboats to assist in building up its business by handling its passengers at the terminus of its road, we cannot see how the Fort Worth City Company could contract for the building of the bridge in question for the City of Fort Worth, although the direct and immediate results of the building of such a bridge would be to afford facilities to the public in reaching the lands of the Fort Worth City Company on the north side of the river with greater ease than by the former routes open to the property of the Fort Worth City Company.

We do not think that the charter of this corporation, read in connection with any general law of the State of Texas applicable to it, would give it the power to make the contract in question, but that the contract in question is manifestly beyond the powers given to such corporation. No reasonable construction

of the laws bearing on the question can torture the language of our statutes to bring the power to make the contract in question within those which are usually regarded as incident to the objects for which the corporation was incorporated.

We respectfully ask that the judgment of the United States Circuit Court for the Northern District of Texas be reversed and judgment rendered herein for the plaintiff in error.

THOMAS P. MARTIN,

Attorney for Fort Worth City Company, Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 16 1893
JAMES H. McKENNEY,
CLERK.

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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

FORT WORTH CITY CO., PLAINTIFF IN ERROR

vs.

SMITH BRIDGE CO., DEFENDANT IN ERROR.

BRIEF AND

ARGUMENT FOR DEFENDANT IN ERROR

BY

M. L. CRAWFORD, Its Attorney.

C. O. Hervey & Co., Printers, Fort Worth.

In the Supreme Court of the United States.

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M. L. CRAWFORD, Its Attorney.

The statement of the suit contained, in the brief of plaintiff in error, is materially defective in that part which attempts to set out the matter pleaded in the first supplemental petition of the plaintiff in the court below.

It is alleged, in plaintiff's supplemental petition, that at the time of making the contract with defendant, it (defendant) owned, and still owns, a large tract of land lying on the north side of the Trinity River, over which river the bridge was built, which land defendant had subdivided into lots and blocks and was offering for sale.

That said river separated said land from the city of Fort Worth. That it was necessary, in order to accomplish a profitable and ready sale of said lands, that it have ready and direct means of access from the city of Fort Worth, to said lands, and that defendant had this object in view when it made the contract sued on with plaintiff.

That the erection of said bridge afforded such means of access from said city to said lands.

That immediately upon the completion of said bridge the North Side Street Railway Company constructed on and across said bridge, a street railway, connecting the city of Fort Worth with said lands.

It is further alleged that said North Side Street Railway Company was organized and operated in the interest of defendant company, for the purpose of bringing its said lands into market.

That the stockholders in both corporations are for the most part the same.

That by reason of the erection of said bridge, and the operation of said street railway, the value of defendant's said lands was greatly enhanced, and the sale thereof promoted.

That defendant made the contract with plaintiff for the constuction of said bridge for the purpose of thus promoting its interest and business, and accepted and used the same for said purpose, after its construction by plaintiff, under said contract. And that defendant having contracted with plaintiff to construct said bridge, and having caused plaintiff to expend large sums of money in the construction of same, and having accepted and used said bridge, is estopped from denying the validity of said contract on the ground of a want of power in defendant to make the same.

ARGUMENT OF DEFENDANT IN ERROR

The first, second, fourth and fifth assignments of reror, present in different forms of expression, the question of the power of the Fort Worth City Company, plaintiff in error, to make the contract which is the basis of this suit.

The Court below in the 10th special finding found "that said bridge was expected to enhance the value of the property owned by the defendant by furnishing another mode of access thereto from the city of Fort Worth."

The property referred to in the finding quoted, is the land described in the supplemental petition of plaintiff, (tr. marginal p. 17.) and which is referred to by the witness, A. T. Byers (id. marginal pp. 26, 27 and 28.) This land was the "stock in trade" of the defendant company and its sale, at the highest price attainable, was the legitimate desire and purpose of the company.

The Trinity river runs between the lands referred to and the city of Fort Worth, and Byers testified: "that prior to the execution of the contract sued on, it was discussed among the directory of the defendant company the propriety of the laying of a Street Railway over the bridge to be built, and that it was one of the objects in having the bridge built, and in entering into the contract sued on, to have a street car line run over said bridge through the lands of defendant; that the bridge in question was built, and that before the completion of the same, the North Side Street Railway Company laid two tracks on the bridge, and after its completion, run cars over said bridge for about one year (until the bridge gave

way), directly through the lands of said Fort Worth City Company, etc." (tr. marginal pp. 26--27.)

The same witness testified: "That the stock holders of the Fort Worth City Company and the North Side Street Railway Company were identical." (id. marginal p. 26.)

The testimony of this witness, and that of the witness Edrington, show that before the construction of the bridge in question, the means of access to the Company's lands from the city of Fort Worth were insufficient for the purposes of the Company. (id, marginal pp. 26, 27, 28 and 29.) And "if said bridge had not given way it would have greatly assisted in the sale of the lands of said Fort Worth City Company." (id. marginal p. 27.)

It is not contended that the bridge "gave way" through any fault on the part of plaintiff.

It appears from the testimony above cited, and the contract between plaintiff and defendant (tr. marginal pp. 5 and 6), that plaintiff in error participated in and secured the contract for the construction of the bridge for the sole purpose and as a necessary means to promote a profitable sale of its said lands.

These lands, as shown by the record, constituted a

suburb of the city of Fort Worth, with the Trinity river intervening; and by securing the construction of the bridge, a street railway connection between the two was assured. This necessarily would enhance the value of the Company's lands and facilitate their sale.

We submit that a leading object and purpose of the organization of the Fort Worth City Company, as defined in its charter, being the sale of its lands after purchase and sub division, the power to sell includes necessarily the power to adopt all appropiate means to accomplish that object. To say that the charter confines the corporation to the three specific acts of purchasing sub-dividing and selling lands, and that it prohibits the doing of things, and the use of its credit or the expenditure of its money for purposes, which are necessary and indispensible to the achievement of the named objects, would be an absurdity. The power to sell its lands granted by the charter, necessarily implies the power to attract purchasers by the usual legitimate business methods, and to use its credit, money or property in a reasonable way for that purpose. To render its lands eligible and desirable for homes or other purposes, and to promote their speedy and profitable sale, the defendant Company in this case contracted to secure better

facilities for transit between its lands and the city of Fort Worth.

We insist therefore, that the contract between plaintiff and defendant in this case was within the powers granted by the charter.

In the case of Weckler vs. First National Bank, 42d Maryland 581, the Court said: "In deciding whether a corporation can make a particular contract, it must be considered in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent on the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose; a corporation has no other powers than such as are specially granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted."

Article 589 Revised Statutes of Texas cited, and relied on by Plaintiff in Error, allows a corporation to employ its means: "to accomplish the legitimate objects of its creation." Article 575, Sub-division 7, Revised Statutes

of Texas, gives to a corporation the power "to enter into any obligation or contract essential to the transaction of its authorized business."

These statutory provisions having been in force at the date of the contract, form a part of the same, and it must be construed with their aid.

In the case of Green Bay, etc., R. R. Co., vs. Union, etc., Co., 107 U. S. Rep. 98, the Court said: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The 10th finding of facts of the Court below: "That the bridge was expected to enhance the value of the property owned by the defendant, by furnishing another mode of access thereto from the city of Fort Worth," is amply sustained by the testimony of Byers and Edrington above cited. And the conclusion of law, "that the defendant had the power to make the contract here sued on, and the same is therefore legal, valid and bind-

ing upon it", is a correct deduction from the findings of facts by the Court below. These findings show that the contract was fully performed by the plaintiff in compliance with the provisions of the same, and that the other parties to said contract, viz: The City of Fort Worth and the County of Tarrant had each performed its part of said contract.

Plaintiff in error refused to comply with its contract on the ground mainly, that it had contracted beyond its powers as a corporation.

This contention cannot prevail for the reasons already submitted, and for the further reason that "having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." (Hitchcock vs. Galveston, 96, U. S. Rep. p. 351.) "Where there is a question of a contract between a corporation and another party, and the contract has been performed by the other party, and the corporation has received the benefit of the contract, it will not be permitted to plead that on entering into the contract it exceeded its chartered powers." (Bond vs. Terrill M'f'g. Co., 82 Tex. Rep. 309. R'y vs. Gentry, 69 Tex. Rep. 632.) "It is now very well settled that a cor-

poration cannot avail itself of the defense of *ultra vires* when the contract itself has been, in good faith, fully performed by the other party, and the corporation has had he full benefit of the contract." (Beach on Private Corporations §424.)

The third error assigned by Plaintiff in Error relates to the failure of Defendant in Error to complete the bridge at the time stipulated in the contract.

The Court found as a fact that time was not of the essence of the contract and that the delay was caused alone by the city of Fort Worth. And that defendant was not damaged by the delay. (6th and 7th finding of facts. tr. marginal p. 41.)

We respecttully ask that the judgment of the Court below be affirmed.

M. L. CRAWFORD,
for Defendant in Error.